

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOSEFINA S. SEPULVEDA,	)	
	)	No. CV-09-3122-JPH
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on March 25, 2011 (Ct. Rec. 19, 28). Attorney D. James Tree represents plaintiff. Special Assistant United States Attorney Richard M. Rodriguez represents the Commissioner of Social Security (Commissioner). The parties consented to proceed before a magistrate judge (Ct. Rec. 8). On January 26, 2011, plaintiff filed a reply (Ct. Rec. 34). After reviewing the administrative record and the briefs filed by the parties, the court **grants** defendant's motion for summary judgment (Ct. Rec. 28) and **denies** plaintiff's motion for summary judgment (Ct. Rec. 19).

**JURISDICTION**

Plaintiff protectively filed concurrent applications for supplemental security income (SSI) and disability insurance benefits (DIB) July 28, 2006, alleging onset as of May 1, 2004,

1 due to breast cancer, lymphedema, a trigger thumb, carpal tunnel  
2 syndrome and a breathing problem, as well as the mental  
3 impairments of depression, post-traumatic stress disorder (PSTD),  
4 decreased memory and concentration, and illiteracy (Tr. 85, 150-  
5 153 - SSI application; Tr. 154-156 - DIB application, Tr, 213,  
6 226)<sup>1</sup>. The applications were denied initially and on  
7 reconsideration (Tr. 75-82, 85-86). Administrative Law Judge (ALJ)  
8 R. J. Payne held hearings on January 14, 2009 (Tr. 57-67), and  
9 April 7, 2009 (Tr. 28-53). Plaintiff, represented by counsel, did  
10 not testify at the first hearing because there was no interpreter;  
11 however, a medical doctor and a psychologist testified.  
12 Plaintiff's counsel waived translation, amended the onset date  
13 from April 22, 2000, to May 1, 2004, and stipulated step three was  
14 not met (Tr. 11, 57-59, 67). At the second hearing plaintiff and a  
15 vocational expert testified (Tr. 30-46; 47-53).

16 The ALJ issued an unfavorable decision April 24, 2009 (Tr.  
17 11-20). The Appeals Council denied review on February 17, 2010  
18 (Tr. 1-3). Therefore, the ALJ's decision became the final decision  
19 of the Commissioner, which is appealable to the district court  
20 pursuant to 42 U.S.C. § 405(g). On December 10, 2009, plaintiff  
21 filed this action for judicial review pursuant to 42 U.S.C. §  
22 405(g)(Ct. Rec. 1, 4).

### 23 **STATEMENT OF FACTS**

24 Because the parties are familiar with the facts of the case  
25 they are recited only as necessary to explain the Court's  
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27 <sup>1</sup>Plaintiff was previously entitled to disability benefits  
28 but "was ceased medically in April 2004" (Tr. 182).

1 decision.

2 Plaintiff was 34 years old at onset and 39 when the ALJ filed  
3 his decision. She attended school in Mexico through the ninth  
4 grade (Tr. 30). Ms. Sepulveda reads and writes in Spanish but not  
5 in English (Tr. 30, 38, 208). She underwent treatment for breast  
6 cancer in 2000, and thereafter, for lymphedema (Tr. 30). She has  
7 worked packing and sorting agricultural produce, medium and light  
8 exertion jobs, respectively (Tr. 48).

9 Plaintiff testified she has constant pain and fluid retention  
10 in her right arm; she wears a compression glove and uses a breast  
11 plate nightly (Tr. 31). Her testimony about past surgeries is a  
12 little unclear but it appears plaintiff had surgery on her index  
13 finger in March and May 2007, and carpal tunnel release in her  
14 right hand. She now has problems holding things in her right hand  
15 (Tr. 31-33). Ms. Sepulveda can stand for 3 hours and walk 2-3  
16 blocks. Once or twice a day she takes a 45 minute nap (Tr. 35-36).  
17 Medication prescribed for depression helps with sleep (Tr. 33-34).  
18 She has difficulties with concentration and focus (Tr. 36).

19 Plaintiff lives with her two children, ages 16 and 10 (Tr.  
20 37). She drives each child to their respective schools daily,  
21 cooks, reads, watches television for 2-3 hours a day, shops every  
22 2-3 weeks for 2 hours, and attends church for 90 minutes at least  
23 once a week (Tr. 40-43). She has never been in jail (Tr. 39).

24 On August 24, 2006 [between onset in 2004 and the 2009  
25 hearing], plaintiff reported she needs to rub her right arm daily  
26 when she wakes up to relieve swelling. She takes care of her son,  
27 age seven, and her 13 year old daughter, including getting them  
28 ready for school, taking them to school, and picking them up. She

1 cleans and gardens with the children's help, cooks, does laundry,  
2 drives, and shops. She reads, watches television, plays with her  
3 children when able, regularly visits her parents and the  
4 children's school, and goes to church. Plaintiff wears an arm  
5 "sleeve" and hand brace daily to relieve swelling. She has sleep  
6 problems, arm pain, and cramping. She cannot lift. Reaching is  
7 difficult. She can walk one block. Plaintiff gets depressed. She  
8 needs no reminders to take prescribed medication or to keep  
9 appointments, and is good at following written and spoken  
10 instructions (Tr. 187-194).

#### 11 SEQUENTIAL EVALUATION PROCESS

12 The Social Security Act (the Act) defines disability  
13 as the "inability to engage in any substantial gainful activity by  
14 reason of any medically determinable physical or mental impairment  
15 which can be expected to result in death or which has lasted or  
16 can be expected to last for a continuous period of not less than  
17 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act  
18 also provides that a plaintiff shall be determined to be under a  
19 disability only if any impairments are of such severity that a  
20 plaintiff is not only unable to do previous work but cannot,  
21 considering plaintiff's age, education and work experiences,  
22 engage in any other substantial gainful work which exists in the  
23 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,  
24 the definition of disability consists of both medical and  
25 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
26 (9<sup>th</sup> Cir. 2001).

27 The Commissioner has established a five-step sequential  
28 evaluation process for determining whether a person is disabled.

1 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
2 is engaged in substantial gainful activities. If so, benefits are  
3 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
4 the decision maker proceeds to step two, which determines whether  
5 plaintiff has a medically severe impairment or combination of  
6 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

7 If plaintiff does not have a severe impairment or combination  
8 of impairments, the disability claim is denied. If the impairment  
9 is severe, the evaluation proceeds to the third step, which  
10 compares plaintiff's impairment with a number of listed  
11 impairments acknowledged by the Commissioner to be so severe as to  
12 preclude substantial gainful activity. 20 C.F.R. §§  
13 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
14 App. 1. If the impairment meets or equals one of the listed  
15 impairments, plaintiff is conclusively presumed to be disabled. If  
16 the impairment is not one conclusively presumed to be disabling,  
17 the evaluation proceeds to the fourth step, which determines  
18 whether the impairment prevents plaintiff from performing work  
19 which was performed in the past. If a plaintiff is able to perform  
20 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§  
21 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's  
22 residual functional capacity (RFC) assessment is considered. If  
23 plaintiff cannot perform this work, the fifth and final step in  
24 the process determines whether plaintiff is able to perform other  
25 work in the national economy in view of plaintiff's residual  
26 functional capacity, age, education and past work experience. 20  
27 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,  
28 482 U.S. 137 (1987).

1 The initial burden of proof rests upon plaintiff to establish  
2 a *prima facie* case of entitlement to disability benefits.  
3 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
4 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
5 met once plaintiff establishes that a physical or mental  
6 impairment prevents the performance of previous work. The burden  
7 then shifts, at step five, to the Commissioner to show that (1)  
8 plaintiff can perform other substantial gainful activity and (2) a  
9 "significant number of jobs exist in the national economy" which  
10 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
11 Cir. 1984).

#### 12 STANDARD OF REVIEW

13 Congress has provided a limited scope of judicial review of a  
14 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
15 the Commissioner's decision, made through an ALJ, when the  
16 determination is not based on legal error and is supported by  
17 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
18 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
19 "The [Commissioner's] determination that a plaintiff is not  
20 disabled will be upheld if the findings of fact are supported by  
21 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
22 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is  
23 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
24 1119 n.10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
25 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
26 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
27 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
28 evidence as a reasonable mind might accept as adequate to support

1 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
2 (citations omitted). "[S]uch inferences and conclusions as the  
3 [Commissioner] may reasonably draw from the evidence" will also be  
4 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
5 review, the Court considers the record as a whole, not just the  
6 evidence supporting the decision of the Commissioner. *Weetman v.*  
7 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v.*  
8 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

9 It is the role of the trier of fact, not this Court, to  
10 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
11 evidence supports more than one rational interpretation, the Court  
12 may not substitute its judgment for that of the Commissioner.  
13 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
14 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial  
15 evidence will still be set aside if the proper legal standards  
16 were not applied in weighing the evidence and making the decision.  
17 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,  
18 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
19 support the administrative findings, or if there is conflicting  
20 evidence that will support a finding of either disability or  
21 nondisability, the finding of the Commissioner is conclusive.  
22 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 23 ALJ'S FINDINGS

24 The ALJ found plaintiff was insured through June 30, 2009,  
25 for purposes of her DIB claim (Tr. 11, 13). At step one, he found  
26 although Ms. Sepulveda has worked at times, she has not engaged in  
27  
28

1 substantial gainful activity since onset on May 1, 2004<sup>2</sup> (Tr. 13).  
2 At steps two and three, he found she suffers from lymphedema, an  
3 impairment that is severe but does not meet Listing-level severity  
4 (Tr. 14-15). He found plaintiff less than fully credible (Tr. 17),  
5 a finding she does not challenge on appeal. At step four, ALJ  
6 Payne found plaintiff is able to perform her past work as an  
7 agricultural sorter (Tr. 19). Alternatively, at step five he found  
8 she could do other work, including housekeeping, production  
9 assembly, and attending a cafeteria (Tr. 19-20). The ALJ found  
10 plaintiff is not disabled as defined by the Social Security Act  
11 (Tr. 20).

## 12 ISSUES

13 Plaintiff alleges the ALJ failed to properly weigh the  
14 evidence of physical and mental limitations, and erred at steps  
15 four and five (Ct. Rec. 20 at 8-20).

16 Asserting the ALJ's decision is free of error and supported  
17 by substantial evidence, the Commissioner asks the Court to affirm  
18 (Ct. Rec. 29 at 2-3).

## 19 DISCUSSION

### 20 A. Weighing evidence - standards

21 In social security proceedings, the claimant must prove the  
22 existence of a physical or mental impairment by providing medical  
23 evidence consisting of signs, symptoms, and laboratory findings;  
24 the claimant's own statement of symptoms alone will not suffice.  
25 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated

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26  
27 <sup>2</sup>Plaintiff attempted to work full time in June 2004. She  
28 worked less than a month due to problems with her hand (Tr. 173-  
174, 179).



1 on the basis of a medically determinable impairment which can be  
2 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
3 medical evidence of an underlying impairment has been shown,  
4 medical findings are not required to support the alleged severity  
5 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cr. 1991).

6 A treating physician's opinion is given special weight  
7 because of familiarity with the claimant and the claimant's  
8 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-605 (9<sup>th</sup> Cir.  
9 1989). However, the treating physician's opinion is not  
10 "necessarily conclusive as to either a physical condition or the  
11 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
12 751 (9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
13 treating physician than an examining physician. *Lester v. Chater*,  
14 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
15 given to the opinions of treating and examining physicians than to  
16 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
17 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
18 are not contradicted, they can be rejected only with clear and  
19 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
20 ALJ may reject an opinion if he states specific, legitimate  
21 reasons that are supported by substantial evidence. See *Flaten v.*  
22 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9<sup>th</sup> Cir.  
23 1995).

24 In addition to the testimony of a nonexamining medical  
25 advisor, the ALJ must have other evidence to support a decision to  
26 reject the opinion of a treating physician, such as laboratory  
27 test results, contrary reports from examining physicians, and  
28 testimony from the claimant that was inconsistent with the

1 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
2 751-752 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-1043 (9<sup>th</sup>  
3 Cir. 1995).

4 **B. Physical limitations**

5 Plaintiff alleges the ALJ erred by failing to credit the  
6 opinions of two treating doctors, Matthew Keifer, M.D., and Yvana  
7 Iovino, M.D. (Ct. Rec. 20 at 13-16). The Commissioner asserts the  
8 ALJ's reasons for rejecting these contradicted opinions are  
9 specific and legitimate (Ct. Rec. 29 at 11-16).

10 ALJ Payne considered Dr. Iovino's July 13, 2006, opinion that  
11 plaintiff cannot work due to lymphedema and chemotherapy (Tr. 18;  
12 297). Plaintiff "has gone back to work" sorting and packing  
13 cherries and this "has started the lymphedema to become a problem  
14 again," in addition, she was recently restarted on chemotherapy  
15 (Tr. 297, 299). Dr. Iovino opined plaintiff was unable to "work  
16 the type of jobs she used to be capable of due to her problems  
17 with the lymphedema" (Tr. 299).

18 The ALJ considered Dr. Keifer's September 2008 opinion that  
19 plaintiff would miss four or more days of work each month (Tr. 18-  
20 19, referring to Tr. 423). In September 2006, Dr. Keifer indicates  
21 he diagnosed plaintiff with PTSD following exposure to carbon  
22 monoxide poisoning at work in 2004 (Tr. 294). He referred her to  
23 Dr. Whitmont for evaluation and treatment. Plaintiff now has  
24 "recovered substantially." He observes Ann English, ARNP, recently  
25 evaluated Ms. Sepulveda and assessed a GAF of 75. Dr. Keifer notes  
26 plaintiff continues to experience mild sleep disturbance, takes no  
27 psychotropic medication, and complains of memory problems (Tr.  
28 294-295). He referred her to a neuropsychologist (Tr. 295). In

1 October 2007, he opined plaintiff was able to return to work (Tr.  
2 517).

3 The ALJ considered the opinion of David Rullman, M.D., who  
4 testified at the first hearing (Tr. 15, 18). Dr. Rullman notes  
5 plaintiff was treated for breast cancer in 2000. The record does  
6 not mention lymphedema (swelling in the arm, a common complication  
7 after surgery and radiation) until 2004, four years later (Tr.  
8 62). Dr. Rullman observes plaintiff tried to do warehouse work  
9 "involving lifting that seemed to aggravate her discomfort and/or  
10 swelling in that [right] extremity" (Tr. 62). The record shows she  
11 wears an elastic "stocking" on her right arm which is of some  
12 help. Dr. Rullman points out the degree of swelling has  
13 occasionally been an issue; sometimes doctors describe the  
14 swelling as mild; and, on a few occasions, moderate (Tr. 62-63).  
15 He observes plaintiff underwent right tendon release in March 2007  
16 and was released to "full duty" work in May 2007; she chose,  
17 however, to undergo left carpal tunnel release in May 2007. Dr.  
18 Rullman opines by July 2007, plaintiff was fully capable of all  
19 physical activity (Tr. 63). Records show in February 2008, she  
20 underwent a laproscopic hormonal ablation (removal of ovaries and  
21 tubes to prevent breast cancer recurrence)(Tr. 474, 480). Dr.  
22 Rullman opines plaintiff's only limitation is lymphedema which  
23 causes mild to moderate swelling (Tr. 63). He assesses an RFC for  
24 a range of light work with no limitation in the use of her hands  
25 (Tr. 64-66).

26 To aid in weighing the conflicting medical evidence, the ALJ  
27 evaluated plaintiff's credibility and found her less than fully  
28 credible (Tr. 17). Credibility determinations bear on evaluations

1 of medical evidence when an ALJ is presented with conflicting  
2 medical opinions or inconsistency between a claimant's subjective  
3 complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F.3d  
4 683, 688 (9<sup>th</sup> Cir. 2005).

5 It is the province of the ALJ to make credibility  
6 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
7 1995). However, the ALJ's findings must be supported by specific  
8 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
9 1990). Once the claimant produces medical evidence of an  
10 underlying medical impairment, the ALJ may not discredit testimony  
11 as to the severity of an impairment because it is unsupported by  
12 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
13 1998). Absent affirmative evidence of malingering, the ALJ's  
14 reasons for rejecting the claimant's testimony must be "clear and  
15 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995).

16 "General findings are insufficient: rather the ALJ must  
17 identify what testimony not credible and what evidence undermines  
18 the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*  
19 *Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

20 The ALJ gave clear and convincing reasons for his  
21 unchallenged credibility assessment, including (1) inconsistent  
22 statements; (2) activities inconsistent with claimed disabling  
23 limitations, and (3) a lack of supporting medical evidence for  
24 complaints of disabling impairment (Tr. 17-18). The record  
25 supports the ALJ's reasons.

26 In 2006 plaintiff alleged she could only walk one block. As  
27 the ALJ observes, there is nothing in the record supporting this  
28 statement. One example is plaintiff's statement in April 2005 that

1 she experiences shortness of breath after walking 10-15 minutes.  
2 Prior to carpal tunnel release, she walked for 30 minutes 3-4  
3 times a week (Tr. 325). She was released to work with no  
4 restrictions in October 2007 (Tr. 17). Because a claimant's  
5 inconsistent statements diminish credibility, it is a factor the  
6 ALJ may properly consider. *Thomas v. Barnhart*, 278 F.3d 947, 958-  
7 959 (9<sup>th</sup> Cir. 2002).

8 Ms. Sepulveda's ability to engage in various activities in  
9 excess of claimed disabling limitations, including caring for  
10 children, diminishes her credibility. As the court has held, an

11 ability to fix meals, do laundry, work in the yard,  
12 and *occasionally care for [a] friend's child* served  
13 as evidence of [claimant's] ability to work. If a  
14 claimant is able to spend a substantial part of his  
15 day engaged in pursuits involving the performance of  
16 physical functions that are transferable to a work  
17 setting, a specific finding as to this fact may be  
18 sufficient to discredit a claimant's allegations.

19 See *Morgan v. Apfel*, 169 F.3d 595, 600 (9<sup>th</sup> Cir. 1999)(citation  
20 omitted)(italics added).

21 The medical record does not support plaintiff's complaint of  
22 ongoing fatigue or a daily need to nap (Tr. 17). The ALJ's finding  
23 is correct (see e.g., Tr. 256).

24 Contrary to complaints of disabling limitations, no medical  
25 source has assessed an RFC limiting plaintiff's use of her right  
26 hand or arm, other than indicating her arm swells with overuse.  
27 The ALJ's RFC fully takes this account: plaintiff will avoid (1)  
28 frequent or prolonged pushing or pulling objects over 20 pounds;  
frequent or prolonged pushing or pulling arm controls, and (3)  
repetitive use of the right arm above horizontal level (Tr. 15).

As noted, on October 24, 2007, Ms. Sepulveda was released to work  
with no restrictions (Tr. 17, Ex. 28F/10).

1 The record supports the ALJ's unchallenged credibility  
2 assessment. His reasons are clear, convincing, and supported by  
3 substantial evidence. An ALJ may properly rely on inconsistencies  
4 between statements and conduct, and on the extent of daily  
5 activities, when assessing credibility. See *Thomas*, 278 F.3d at  
6 958-959.

7 The ALJ credited Dr. Rullman's opinion lymphedema causes mild  
8 and occasionally moderate right arm swelling (Tr. 17). The record  
9 supports Dr. Rullman's testimony. See e.g., mild lymphedema noted  
10 (Tr. 237); mild swelling noted (Tr. 239).

11 As noted, in September 2008, Dr. Keifer opined plaintiff's  
12 lymphedema would cause her to miss four or more days of work each  
13 month (Tr. 423). The ALJ rejected his opinion because it is  
14 inconsistent with Dr. Keifer's own 2007 release to work (Tr. 517),  
15 and there is no evidence plaintiff's lymphedema worsened in the  
16 interval (Tr. 18-19). The ALJ observes the dire 2008 assessment is  
17 also inconsistent with Dr. Keifer's treatment notes indicating  
18 plaintiff's use of two types of compression gloves has yielded  
19 good results<sup>3</sup> (Tr. 19). The ALJ's reasons are specific,  
20 legitimate, and supported by the record.

21 Plaintiff alleges the ALJ rejected Dr. Iovino's July 2006  
22 opinion because she is an obstetrics and gynecology specialist.  
23 This is only partially correct. The ALJ also rejected her opinion  
24 because (1) it appears at least partially based on plaintiff's  
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26 <sup>3</sup>In September 2005, treating doctor Vicky E. Jones, M.D.,  
27 opines lymphedema is under control with a compression sleeve.  
28 Plaintiff does not wish to have a physical therapy referral at  
this time (Tr. 346-347). About a year later Dr. Jones notes mild  
lymphedema (Tr. 351).

1 unreliable self report, and (2) the opinion is not well supported  
2 because Dr. Iovino refers to lymphedema (plaintiff's severe  
3 impairment) only twice (Tr. 18). The ALJ's reasons for rejecting  
4 this contradicted opinion are specific, legitimate, and supported  
5 by substantial evidence.

6 With respect to allegedly severe carpal tunnel syndrome, the  
7 ALJ accurately observes CTS (right) was diagnosed in February 2003  
8 but plaintiff put off release for two years because she was "very  
9 busy with her children and other problems" (Tr. 334). The release  
10 surgeries were successful (Tr. 431, 440, 456).

#### 11 **C. Mental limitations**

12 Plaintiff alleges at step two ALJ Payne should have found she  
13 has severe mental impairments (Ct. Rec. 20 at 8-12). The  
14 Commissioner disagrees.

15 The ALJ gave little weight to the contradicted opinion of  
16 Jorge Torres-Saenz, Psy.D., who treated plaintiff for six months  
17 in 2007-2008 (Tr. 15, 553-576). More than a year after onset, in  
18 January 2006, Dr. Torres-Saenz assessed marked and severe  
19 limitations and a GAF of 45 (Ex. 22F). The ALJ observes records  
20 from treating psychologist Andrew Whitmont, Ph.D., show  
21 plaintiff's pain disorder, PTSD, and depression NOS, diagnosed in  
22 August 2005<sup>4</sup>, resolved with treatment by October 2005 (Tr. 14-15,  
23 242-243). In October 2005, Dr. Whitmont assessed a GAF of 79. He  
24 opined all conditions were resolved and plaintiff was ready to  
25 return to work (Tr. 243).

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27 <sup>4</sup>It appears this treatment was related to a Labor and  
28 Industries claim based on plaintiff's exposure to carbon monoxide  
poisoning in May 2004 (Tr. 14, 331).

1 The ALJ considered the opinion of Walter Scott Mabee, Ph.D.,  
2 who testified at the first hearing. Dr. Mabee found no basis in  
3 the record for a PTSD diagnosis. Dr. Mabee observes by October  
4 2005, plaintiff told Dr. Whitmont she was now feeling she had  
5 "regained control and was able to carry on without problems, and  
6 so the case was closed" (Tr. 59-60). As noted, ARNP English  
7 assessed a GAF of 75 (Tr. 61). Dr. Mabee opined plaintiff's mental  
8 impairments are non-severe (Tr. 60).

9 The ALJ notes plaintiff did not seek treatment between  
10 October 2005 and September 2007. She treated from September 2007  
11 until March 2008, and stopped again in December 2008. There are no  
12 further treatment records (Tr. 15).

13 Treatment provider Dr. Keifer notes in April 2006 plaintiff  
14 says overall [psychologically] she is effectively back to normal,  
15 was recently laid off work, and told they would rehire in June  
16 (Tr. 306). He released her to work without restrictions on  
17 February 3, 2006 (Tr. 311).

18 An ALJ may discount a treating professional's contradicted  
19 opinion by giving specific and legitimate reasons supported by  
20 substantial evidence. See *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup>  
21 Cir. 1995). ALJ Payne discounted Dr. Torres-Saenz's opinion  
22 because (1) it is inconsistent with those of Drs. Whitmont and  
23 Mabee; (2) records show symptoms improved with treatment, and (3)  
24 Dr. Torres-Saenz's most recent office note (December 2008) shows  
25 minimal mental health impairment (Tr. 15). These are specific,  
26 legitimate reasons to discredit another treating psychologist's  
27 contradicted opinion. See *Andrews*, 53 F.3d at 1042-1043;  
28 *Magallanes*, 881 F.2d at 751-752.



1 Plaintiff's ability to work, though at less than SGA levels,  
2 also contradicts Dr. Torres-Saenz's assessed severe and marked  
3 mental limitations. An opinion of disability premised to a large  
4 extent upon the claimant's own accounts of his or her symptoms and  
5 limitations may also be disregarded, once those complaints have  
6 themselves been properly discounted. *Andrews v. Shalala*, 53 F.3d  
7 1035, 1043 (9<sup>th</sup> Cir. 1995) citing *Flaten v. Secretary of Health &*  
8 *Human Services*, 44 F.3d 1453, 1463-1464 (9<sup>th</sup> Cir. 1995).

9 The ALJ is responsible for reviewing the evidence and  
10 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
11 *Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
12 trier of fact, not this court, to resolve conflicts in evidence.  
13 *Richardson*, 402 U.S. at 400. The court has a limited role in  
14 determining whether the ALJ's decision is supported by substantial  
15 evidence and may not substitute its own judgment for that of the  
16 ALJ, even if it might justifiably have reached a different result  
17 upon de novo review. 42 U.S.C. § 405 (g).

18 The ALJ's reasons for rejecting Dr. Torres-Saenz's opinion  
19 and finding plaintiff's mental limitations are mild is free of  
20 error and supported by substantial evidence.

21 **D. Step four**

22 Plaintiff asserts the ALJ failed to enter findings of fact as  
23 to plaintiff's RFC, the physical and mental demands of her past  
24 work, and that her RFC would permit returning to her past work  
25 (Ct. Rec. 20 at 16-19). Because the ALJ made these findings, and  
26 properly relied on the VE's testimony, plaintiff's argument fails.

27 The record does not support limitation greater than that  
28 assessed by the ALJ. The court finds the RFC is fully supported by

1 the evidence. This includes evidence from treating and examining  
2 health care providers, plaintiff's activities, and her assessed  
3 credibility. The RFC is free of legal error. Accordingly, the RFC  
4 and questions to the VE are sufficient. *See Osenbrock v. Apfel*,  
5 240 F.3d 1157, 1165 (9<sup>th</sup> Cir. 2001).

6 **E. Alternative step five finding**

7 Plaintiff alleges the ALJ's alternative step five finding is  
8 erroneous because it is based on an incomplete hypothetical, one  
9 that fails to take into account all of her impairments (Ct. Rec.  
10 20 at 19-20). Citing *Stubbs-Danielson v. Astrue*, 539 F.3d 1169,  
11 1175-1176 (9<sup>th</sup> Cir. 2008), the Commissioner asserts a claimant  
12 "does not establish that an ALJ's step-five determination is  
13 incorrect by simply restating his or her arguments that the ALJ  
14 improperly discounted certain evidence" when the court has  
15 determined the ALJ properly weighed the evidence (Ct. Rec. 29 at  
16 21).

17 The Commissioner is correct.

18 **CONCLUSION**

19 Having reviewed the record and the ALJ's conclusions, this  
20 court finds that the ALJ's decision is supported by substantial  
21 evidence and free of legal error.

22 **IT IS ORDERED:**

23 1. Defendant's motion for summary judgment (**Ct. Rec. 28**) is  
24 **granted.**

25 2. Plaintiff's motion for summary judgment (**Ct. Rec. 19**) is  
26 **denied.**

27 The District Court Executive is directed to file this Order,  
28 provide copies to counsel for the parties, enter judgment in favor

1 of Defendant, and **CLOSE** this file.

2 DATED this 31st day of March, 2011.

3  
4 s/ James P. Hutton

5 JAMES P. HUTTON  
6 UNITED STATES MAGISTRATE JUDGE  
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